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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~850~~ 106

MARY E. DOYLE, Widow, and ANNIE E. DOYLE, Mother, of Bernard C. Doyle, deceased,

Petitioners,

vs.

THE LORD BALTIMORE HOTEL COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurer,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND, AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Mary E. Doyle, widow, and Annie E. Doyle, mother, of Bernard C. Doyle, deceased, respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals of Maryland rendered in this cause on April 26, 1949, reversing the judgment and decision of the Baltimore City Court and holding that the claims of petitioners for compensation for his death are barred.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case arises under the Workmen's Compensation act of Maryland, a compulsory statute, and involves petitioners' contention that the provisions of a subparagraph of the hernia subsection of that act, Article 101, §35(5), Code of P.G.L. of Md. (Flack's 1947 Supp.), as newly construed and applied by the Court of Appeals of Maryland to exclude their claims for compensation benefits for the death of their husband and son, respectively, an employee of respondent, The Lord Baltimore Hotel Company, unconstitutionally denied petitioners the equal protection of the laws in violation of the guarantee against such denial in the 14th Amendment to the federal Constitution.

In express reversal of its theretofore subsistent rule, in construction of the act, that accidental injury causing aggravation or acceleration of an existing hernia, with or without resulting strangulation, was compensable, the court below now reinterprets the subparagraph to provide that claims resting upon aggravation or acceleration of existing herniæ shall be compensable only when such aggravation or acceleration involves strangulation necessitating immediate operation, but wholly non-compensable when the aggravation or acceleration involves any other resulting condition or takes any other form, despite the fact that, as here, such other condition or form similarly necessitates immediate operation and is intrinsically identical to strangulation and equally as dangerous and potentially fatal.

By this new and unanticipated construction of the subparagraph in question as applicable to bar claims resting on aggravation of existing herniæ unless strangulated and

necessitating immediate operation, the state makes a classification of such claims without basis in reason and without relevancy to any purpose of the hernia subsection or the act as a whole. Consequently, it is contended, under the authorities of this Court, especially those involving and sustaining the constitutional validity of workmen's compensation statutes, that the classification is arbitrary and discriminatory and the subparagraph unconstitutional as construed and applied against petitioners who are, by the enforcement of the subparagraph to bar their claims, left without any remedy whatever against the employer, either under the act or at common law for its negligence. *State, use of Wilson v. North East Fire Brick Co.*, 180 Md. 367, 371.

Petitioners do not question the power of the court below to reinterpret the subparagraph and reverse its former construction, and to overrule its prior holding, nor do they seek review of the court's action in these respects. They contend, however, that the subparagraph as newly construed and applied to exclude their claims denied petitioners the equal protection of the laws, and that the unexpected reversal by the court below of its former rule of compensability of claims of this kind, constituting an unanticipated infringement of the federal right, fully sustains the seasonableness of the raising of the federal questions by motion for reargument of the cause below.

The matter involved herein is better viewed against the background of the Maryland act and its hernia subsection as well as the facts, sustaining, as they do, petitioners' position that the classification thus made is of matters between which there exists neither difference nor distinction.

From the time of the enactment of the first workmen's compensation act in Maryland in 1914 claims, as those here,

resting upon aggravation of existing herniæ were compensable under the general provisions of the act as other claims similarly resting on aggravation of existing disease or infirmity. Until the decision below herein the subparagraph in question had been construed to be perfectly consistent with that rule. In its original form, as added by amendment in 1931 to the act, the subparagraph imposed on a claimant of compensation for hernia the requirement of proof that the hernia did not exist prior to the injury for which he claimed compensation. By a liberalizing proviso added to the subparagraph in 1935 the requirement of proof that the hernia was not a pre-existing one was made inapplicable if, as the result of accidental injury, a pre-existing hernia became so strangulated that an immediate operation was necessary. The subparagraph took that form at the time of the injury here (with the exception of the addition of the word "strain" in 1945).

With the subparagraph in that form before it in 1940, the court below, in *G. L. Baking Co. v. Wickham*, 178 Md. 381, 388, on which petitioners relied below, reaffirmed the rule of compensability under the general provisions of the act of claims resting on aggravation or acceleration of pre-existing herniæ. It there said that an accident was compensable if it "either accelerated an existing rupture or developed a strangulated hernia." That case and its quoted language were cited with approval by the court below in *Bethlehem Steel Co. v. Zeigenfuss*, 1946, 187 Md. 283, 287. Yet in its decision below the Court of Appeals now for the first time construes the legislative intent to be, and the subparagraph to provide (18):*

> "When the legislature, in 1935, specifically allowed recovery in cases involving the strangulation of pre-

* Unless otherwise indicated, figures in parentheses are page numbers of the transcript of the record.

existing herniæ, it excluded recovery for aggravation or acceleration of pre-existing herniæ, short of strangulation, by necessary implication."

Continuing, in reversing the rule of the *Baking Company* case, the court below said (18):

"* * * But insofar as the language quoted (from the *Baking Company* case) may be taken to imply that the acceleration of a pre-existing hernia, without strangulation, is compensable, we think it is inconsistent with the later holding in *Bethlehem Steel Co. v. Zeigenfuss, supra,* and we must decline to follow it."

The facts at bar, which are stipulated (4-8), establish for these claims a basis essentially and intrinsically identical to one of a claim the court below holds would be compensable under the subparagraph. Yet the court below excludes petitioners' claims from compensability, holding that although aggravation of a pre-existing hernia involving its strangulation and necessitating immediate operation is included and death resulting therefrom compensable, nevertheless, because the aggravation or acceleration of the deceased's existing hernia did not, as it could not, involve its strangulation, petitioners' claims are, by the subparagraph, relegated to the excluded class of claims resting upon aggravation of existing herniæ.

It is conceded and stipulated here that, arising out of and in the course of his extra-hazardous employment as a steam engineer by respondent The Lord Baltimore Hotel Company, the deceased on June 12, 1947, sustained an accidental injury aggravating or accelerating a pre-existing ventral hernia and necessitating an immediate operation for its correction. The deceased was employed by the Hotel Company in 1942. Following an operation for ulcers in 1943 there developed at the site of the incision a ventral

hernia whose size increased for a year or two and then remained quiescent. Before it was injured the hernia was neither painful nor at all disabling. June 12, 1947, while repairing an overhead leak in a ceiling line in the hotel, he slipped from a ladder and fell against a sump pump, striking it with his stomach and a portion of the hernia, thereby injuring his stomach and aggravating or accelerating his hernia so that it expanded and its size became "formidable". An immediate operation became necessary.

June 21, 1947, the deceased was operated on to correct his hernia and its aggravation caused by the accidental injury of June 12, 1947. He died from cardiac collapse a few minutes after the operation, and the court below held that his death was the natural and logical consequence of his accidental injury (16). The operation would not have been necessary but for his accidental injury of June 12, 1947. He was 58 years of age at the time of his death. Petitioners were wholly dependent upon the deceased for their support.

It is to be importantly noted that the nature and size of the existing hernia here and the absence of any sufficient amount of tissue or muscle surrounding it made its strangulation physiologically impossible.

B.

JURISDICTION

Petitioners seek a review by certiorari, pursuant to §1257(3) of Title 28, U.S.C., of a final judgment of the Court of Appeals of Maryland, the highest court of the state, rendered and passed April 26, 1949, when it finally disposed of, by overruling without opinion, petitioners' motion for reargument of the cause.

The state statute, the validity of which is drawn in question on the grounds of its repugnancy to and its infringement of rights secured by the equal protection clause of the 14th Amendment to the federal Constitution, is an unnumbered subparagraph of the subsection relating to hernia of the Workmen's Compensation act of Maryland, codified as Article 101, §35(5), Code of P. G. L. of Md. (Flack's 1947 Supp., p. 1929). The subparagraph (set out in full *infra*, pp. 11-12) was by the decision hereinbelow of the Court of Appeals newly construed to provide that claims resting upon aggravation of pre-existing herniæ shall be compensable only when such aggravation involves strangulation necessitating immediate operation, but wholly non-compensable when the aggravation involves any other resulting condition or takes any other form, albeit necessitating immediate operation and essentially identical to strangulation.

Petitioners' federally secured rights were not infringed until the decision of the Court of Appeals of Maryland which, by its opinion filed March 10, 1949, specifically reversed its previous construction of the workmen's compensation act and the subparagraph in question and, expressly and wholly unanticipatedly, overruled (18) its prior decision, *G. L. Baking Co. v. Wickham,* 1940, 178 Md. 381, 388, on which petitioners relied below, which had affirmed the compensability of claims resting upon aggravation or acceleration of pre-existing herniæ that did not strangulate. The decision of the Court of Appeals, wherein respondents were appellants, reversed a judgment of the Baltimore City Court, the court of first instance, and remanded the case to it with instructions to enter judgment affirming the finding of the Industrial Accident Commission of Maryland disallowing the claims of petitioners, the widow and mother, respectively, of the deceased, against his employer, the respondent The Lord Baltimore Hotel Company.

Before the Commission, where all claims for compensation under the act are originally heard and determined, petitioners were without counsel and no issue was there submitted and no determination made whether the death of the employee resulted from aggravation or acceleration of his pre-existing hernia and was, therefore, compensable under the general provisions of the act, or as to the applicability of the subparagraph to their claims as resting on such aggravation or acceleration. The claims were there tried and determined merely as for compensation for death under the hernia subsection of the act. The Commission found (2), on issues submitted by respondents, that the deceased sustained an accidental injury or strain arising out of and in the course of his employment, that he had a pre-existing hernia that did not become strangulated, that an immediate operation was necessary, and that his death was not the result of an accidental injury or strain arising out of and in the course of his employment. On these findings the Commission disallowed the claims (2).

On petitioners' appeal from that decision to the Baltimore City Court, as permitted by the act, Code, Article 101, §57, the case was submitted on stipulation and agreed statement of facts (4-8) to the trial court, sitting as a jury, who filed a memorandum in writing (9-14) holding the death compensable as any other resulting from aggravation or acceleration of pre-existing infirmity (13) and directing reversal of the decision of the Commission. Respondents' appeal to the Court of Appeals, likewise permitted by §57 of the statute, followed.

As stated, no federal right of petitioners was affected until the decision of the Court of Appeals, and consequently no federal question was raised or submitted to it in the original briefs or oral argument. Because that court's reversal of its previous construction of the act in the *Baking*

Company case was altogether unanticipated, petitioners' first opportunity for challenging the constitutional validity of the subparagraph as newly construed and to claim infringement of their rights under the federal Constitution was by their motion for reargument. This motion (19-86), permitted by Rule 43 of the Rules of the Court of Appeals of Maryland, was seasonably filed April 9, 1949, and raised and argued the federal questions here sought to be reviewed.

The motion for reargument was received and considered (87) by the court below but overruled (87) without opinion April 26, 1949. In these circumstances it is believed that the federal questions were timely raised and are reviewable here. *Saunders v. Shaw,* 244 U.S. 317, 320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-678; *American Surety Co. v. Baldwin,* 287 U.S. 156, 164; *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320; *Ohio v. Akron Metropolitan Park District,* 281 U.S. 74, 79; *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 367; *Herndon v. Georgia,* 295 U.S. 441, 444.

C.

QUESTIONS PRESENTED

I. Do the provisions of the hernia subsection of the Workmen's Compensation act of Maryland allowing the recovery of compensation for claims resting upon aggravation or acceleration of pre-existing herniæ only where strangulation occurs and an immediate operation is necessary, while wholly excluding from compensation all other claims resting upon aggravation or acceleration of pre-existing herniæ and necessitating immediate operation but involving resulting conditions other than, yet equally as dangerous and potentially fatal as, strangulation, deny to claimants in the latter class the equal protection of the

laws in violation of their rights secured by the 14th Amendment to the federal Constitution?

II. Were petitioners, in the circumstances disclosed, denied the equal protection of the laws by the application, to bar their claims, of the provisions of the hernia subsection of the act limiting the compensability of claims resting upon aggravation or acceleration of pre-existing herniæ to those cases where strangulation occurs and immediate operation is necessitated?

D.

STATUTES INVOLVED

The Workmen's Compensation act of Maryland is codified as Article 101 of the Code of Public General Laws of Maryland. Its provisions effective at the time of the accidental injury here, June 12, 1947, are as set forth in Flack's 1947 Cumulative Supplement to the Annotated Code of Maryland, pp. 1891 to 1969, incl. The provisions involved are contained in §14, "Suit—Methods of Insurance", and in §35, "Claims and Compensation; Benefits." §35(5) embraces the provisions relating to claims for compensation for herniæ, including the subparagraph in question which is the third subparagraph in the hernia subsection and begins with the word "Second." The general provisions of the act requiring payment of compensation or benefits for death resulting from accidental injury are contained in §14 and in subsection (7) of §35.

The following are the pertinent provisions of §§14 and 35:

Suit—Methods of Insurance.

> 14. Every employer subject to the provisions of this Article, shall pay or provide as required herein compensation according to the schedules of this Article for the disability or death of his employee resulting

from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this Article.

The liability prescribed by the last preceding paragraph shall be exclusive, * * *.

Claims and Compensation; Benefits.

35. Each employee (or in the case of death his family or dependents) entitled to receive compensation under this Article shall receive the same in accordance with the following schedule and except as in this Article otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

* * *

(5) In all claims for compensation for hernia, compensation may be allowed only upon definite proof to the satisfaction of the Commission.

First. That there was an accidental injury causing hernia, arising out of and in the course of the employee's employment; or that the claimant sustained a hernia resulting from a strain arising out of and in the course of his or her employment.

Second. That the hernia did not exist prior to the injury or strain for which compensation is claimed; provided that if as the result of an accidental injury,

or as the result of a strain, arising out of and in the course of the employee's employment a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply.

Third. That, anything in this Article respecting notice to the contrary notwithstanding, such injury or strain was reported to the employer within fifteen days next following its occurrence.

All hernia, inguinal, femoral or otherwise, so proven to be the result of such injury or strain, shall be treated in a surgical manner by operation whenever practicable. If death results from such operation, the death shall be considered as a result of the injury or strain, and compensation paid in accordance with the provisions of this section. In non-fatal cases, time loss only shall be compensated, provided, however, that in computing lost time there shall not be included any time lost from delay in the holding of a hearing when such delay shall have been occasioned at the request, or by the fault, of the claimant, unless it is shown by special examination that the injured employee has a permanent partial or permanent total or temporary total disability resulting from the operation. If so, compensation shall be paid in accordance with the provisions of this Article, with reference to permanent partial disability or permanent total or temporary total disability as the case may be.

In case the injured employee refuses to undergo an operation for the cure of the said hernia, he shall be allowed compensation for a period of seven and one-half (7½) weeks, and if it be shown to the satisfaction of the Commission that because of age or previous physical condition, it is considered unsafe for the employee to undergo such operation, such refusal may be excused by the Commission, in which event the employee shall be allowed compensation for the period

of actual disability resulting from such hernia, not to exceed fifty-two (52) weeks, and in either event such payments shall be in lieu of all benefits for or on account of disability or death resulting or alleged to have resulted from such injury.

* * *

(7) (Dependents) In case the injury causes death within the period of three years the benefits shall be in the amounts and to the persons following:

* * *

If there are wholly dependent persons at the time of death, the payment shall be sixty-six and two-thirds per centum of the average weekly wages, not to exceed, however, a maximum of Twenty Dollars per week, * * * and to continue for the remainder of the period between the date of death and no more than Five Hundred weeks after the date of injury and not to amount to more than a maximum of Seventy-five Hundred ($7,500.00) Dollars nor less than a minimum of One Thousand ($1,000.00) Dollars.

E.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. A provision of the Maryland Workmen's Compensation act, which "cannot be sustained except on the ground that it is a reasonable exercise of the police power of the state," *New York C. R. Co. v. White*, 243 U.S. 188, effecting the classification of claims resting upon a specified injury, aggravation of existing hernia, in a manner and to an extent not heretofore determined by this Court, has been directed by the Court of Appeals of Maryland to be enforced to preclude all recovery by the dependents of a deceased employee for his death which concededly resulted proximately from an accidental injury sustained in the course of extra-hazardous employment. The problems sought to be

justly settled by state workmen's compensation statutes, "affecting one of the most important social relations," *New York C. R. Co. v. White, supra,* call for definitive solution by this Court when they involve a palpable trespass over the boundary of permissible state action, especially when the evils at which these statutes were aimed are caused to be re-created by novel and invidious provisions of an exclusionary nature which have been allowed to creep into a state act. When, beginning more than thirty years ago, this Court in a series of cases, cited in the brief following, sustained the constitutional validity of state workmen's compensation laws, none of them contained a "hernia provision" or any exclusionary proviso resembling one. In no case since decided by this Court has there been any mention, much less a determination, of the constitutional boundary of state action in respect of provisions relating to claims for compensation for herniæ. If a state may, under the guise of effectuating the salutary purposes of its compensation statute, deny all right of recovery, both under such statute and at common law, for a death occurring in the circumstances admitted here, then the substantial rights of all employees under these acts are affected if not seriously jeopardized.

2. Moreover, the decision of the Court of Appeals of Maryland directing the enforcement of the subparagraph here drawn in question ignores that, as it is applied to discompensate petitioners, it is subject to constitutional defects which this Court in applicable decisions has held to be invalidating of state legislation. There is not here involved the validity of a hernia exclusionary provision of the usual type. The subparagraph which the Court of Appeals of Maryland sustained and gave effect to makes an arbitrary and discriminatory classification in the teeth of the salutary and inflexible rule of the decisions of this

Court that classification "must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand," *Truax v. Corrigan*, 257 U.S. 312, 338. Only Maryland, of forty-eight states having workmen's compensation or employers' liability statutes, has enacted hernia provisions under which, by means of a scheme of subclassification, the payment and withholding of compensation where aggravation or acceleration of existing herniæ are involved is made a matter of frivolity and caprice. The emasculatory result if not the purpose and mode of accomplishing the denial of recovery in these instances is reminiscent of that ensuing from the insidious processes by which were evolved the "fellow servant," "assumption of risk," "promise to repair," "simple tool" and other concepts and doctrines to whittle away the benefits intended by the federal Employers' Liability Acts. What has been done in the case at bar reflects but a minor variation of the same theme. Here, however, there has been total destruction of all rights. Maryland did not stop with the mere differentiation and classification of claims for compensation for herniæ. It singled out of the hernia class for special treatment claims resting upon aggravation of existing herniæ, and then further subdivided those claims into separate but wholly artificial subclasses, and arbitrarily and capriciously limited compensation to those involving technical strangulation and necessitating immediate operation, excluding all other claims although functionally and physiologically identical. In upholding and applying those provisions the Court of Appeals could find neither a real difference between the included and the excluded classes nor any relation between the subclassification and the purposes of the legislation. For there is none.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of all proceedings in the case entitled and numbered on its docket, "The Lord Baltimore Hotel Company, Employer, and Liberty Mutual Insurance Company, Insurer, appellants, v. Mary E. Doyle, widow, and Annie E. Doyle, mother, of Bernard C. Doyle, deceased, appellees," No. 108, October Term, 1948, and that the judgment and decision of the Court of Appeals of Maryland in the case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

PAUL BERMAN,
SIGMUND LEVIN,
THEODORE B. BERMAN,
Counsel for Petitioners.

Baltimore, Maryland,
June 6, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (15-18) has not yet been reported in the official State Reports. It was filed March 10, 1949, and may be found in full in 64 A. 2d 557. The opinion of the Baltimore City Court (Sherbow, J.), the court of first instance, is appended hereto (9-14).

II.

JURISDICTION

Jurisdiction is invoked pursuant to §1257(3) of Title 28 of the United States Code, there being drawn in question the validity of provisions of the Workmen's Compensation act of Maryland on the ground of their repugnancy to and their infringement of rights specially set up and claimed under the equal protection clause of the 14th Amendment to the federal Constitution.

III.

STATEMENT OF THE CASE

A full statement of the case has been given under heading A in the petition for writ of certiorari, and for brevity is not repeated here. The facts are stipulated in writing (4-8).

IV.

SPECIFICATION OF ERRORS

The Court of Appeals of Maryland erred:

1. In sustaining and giving effect to the provisions of the hernia subsection of the Workmen's Compensation act of Maryland allowing the recovery of compensation for claims resting upon aggravation or acceleration of pre-existing

herniæ only where strangulation occurs and an immediate operation is necessary, while wholly excluding from compensation all other claims resting upon aggravation or acceleration of pre-existing herniæ and necessitating immediate operation but involving resulting conditions other than, yet equally as dangerous and potentially fatal as, strangulation.

2. In directing the enforcement, to bar the claims of petitioners, of the provisions of the hernia subsection of the act limiting the compensability of claims resting upon aggravation or acceleration of pre-existing herniæ to those cases where strangulation occurs and immediate operation is necessitated.

V.

ARGUMENT

In Providing that Claims resting upon Aggravation or Acceleration of Existing Herniae shall be Compensable only when such Aggravation or Acceleration involves Strangulation requiring immediate operation, while wholly denying Compensation for all other Claims similarly resting upon Aggravation or Acceleration of Existing Herniae and requiring immediate operation, the Hernia Subsection of the Workmen's Compensation Act of Maryland makes an Arbitrary Classification without basis in reason and altogether unrelated to any purpose of the Hernia Subsection or the the Act as a whole, and, consequently, unconstitutionally discriminates against, and denies the Equal Protection of the Laws to, Claimants in the Proscribed Class.

Petitioners do not question the state's power in its workmen's compensation act divisively to deal with claims for compensation for herniæ, or to constitute them a separate and special class requiring exceptional treatment different

from that accorded other injuries. The power exerted here, however, to deprive petitioners of all compensation and of all other right of recovery for a death concededly resulting proximately from an accidental injury in the course of extra-hazardous industrial employment, far transcends the boundary of permissible and valid classification. It has resulted in a rank and gross discrimination against petitioners.

Moreover, under the harsh and minority rule adopted in Maryland, as stated in *State, use of Wilson v. North East Fire Brick Co.*, 1942, 180 Md. 367, 371, the result of the exclusion under the act of benefits for the death of their deceased leaves petitioners with no remedy whatever at common law against his employer for its negligence causing his death.

After first specially classifying claims for compensation for herniæ the state subsequently, by means of subdivision and further classification, singled out for extraordinary treatment those claims resting on aggravation or acceleration of existing herniæ. As to these it has now made a further yet wholly illusory and irrational subclassification of cases where the aggravation involves technical strangulation and those where it does not. Claims in the first subdivision are made compensable, while those in the second are altogether excluded. Petitioners' claims were relegated to the barred class. It is conceded and stipulated as fact that it was medically impossible for their deceased's existing hernia to strangulate, and that the accidental injury he sustained necessitated an immediate operation from which he died.

To accomplish the denial of compensation here a new construction, in express reversal of its prior holding to the contrary, was placed by the court below on an amendment

adopted by the legislature in 1935 to the hernia subsection of the act. It is the application to this case of the 1935 amendment as thus newly construed which, we earnestly contend, has unconstitutionally denied petitioners the equal protection of the laws. To excise this abortive amendment of 1935 will not impair the efficacy of the act or affect the declared policy of the state in respect of pre-existing herniæ and their aggravation, as a brief view of the hernia subsection and its background in the act will disclose.

The original workmen's compensation law of Maryland, Acts of 1914, ch. 800, made no mention of herniæ. Consequently, when they occurred due to accidental injury arising out of and in the course of included employments, claims for compensation for resulting disability or death were compensable as other claims under the general provisions of the act. *Baber v. John C. Knipp & Son*, 1933, 164 Md. 55.

The first special provisions relating to claims for compensation for hernia, Acts of 1931, ch. 363, added several subparagraphs to the subsection of the act dealing with permanent partial disability. The added subparagraphs provided, *inter alia*, that compensation for hernia could be allowed only upon definite proof that the hernia did not exist prior to the injury for which compensation was claimed. Their purpose was declared to be "to restrict compensation for hernia to accidents noticed and reported at or about the time of their occurrence", *Lloyd v. Webster*, 1933, 165 Md. 574, 577.

However, claims resting upon *aggravation or acceleration of existing herniæ*, as distinguished from claims for compensation for herniæ, were not affected much less excluded by the 1931 amendment and remained compensable under the general provisions of the act, as other claims

resting upon aggravation or acceleration of existing disease or infirmity, until the decision in this case below expressly overruling *G. L. Baking Co. v. Wickham*, 1940, 178 Md. 381, 388, wherein that rule of compensability had been affirmed, and specifically declaring it to be otherwise.

The second statutory change relating to claims for compensation for herniæ, Acts of 1935, ch. 487, was an amendment of the hernia subparagraphs to the form they took (with the exception of the addition of the word "strain" by Acts of 1945, ch. 336) at the time of the accidental injury to the deceased here, June 12, 1947.* The 1935 amendment added to the subparagraph of the 1931 amendment

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* The provisions relating to claims for compensation for herniæ, in effect at the time of the injury here, were codified as a separate subsection of the section of the statute dealing with claims, compensation and benefits. Art. 101, §35(5), Code of P.G.L. of Md. (Flack's 1947 Supp.). The subparagraph in question provided:

> (5) In all claims for compensation for hernia, compensation may be allowed only upon definite proof to the satisfaction of the Commission.
>
> * * *
>
> Second. That the hernia did not exist prior to the injury or strain for which compensation is claimed; provided that if as the result of an accidental injury, or as the result of a strain, arising out of and in the course of the employee's employment a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply.

By Acts of 1949, ch. 461, approved April 29, 1949, this subparagraph was further amended so as now to provide:

> Second. That the hernia did not exist prior to the injury or strain for which compensation is claimed; provided that if as the result of an accidental injury, or as the result of a strain, arising out of and in the course of the employee's employment a pre-existing hernia becomes so strangulated, *incarcerated or becomes so aggravated* that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply.

requiring proof that the hernia did not pre-exist the injury a new proviso expressly waiving such proof in cases where aggravation or acceleration of existing herniæ involved their strangulation and necessitated immediate operation. In newly construing the subparagraph as amended in 1935 the court below in the instant case said:

> "When the legislature, in 1935, specifically allowed recovery in cases involving the strangulation of pre-existing herniæ, it excluded recovery for aggravation or acceleration of pre-existing herniæ, short of strangulation, by necessary implication."

The claims of petitioners were for compensation for death under the general provisions of the act, §§14 and 35(7), Article 101, and were not rested on the hernia subsection whose provisions only partially encompass situations where death occurs as a result of accidental injury causing hernia. Its provisions make no mention, for example, even of a death resulting from an accidental injury causing hernia which was not a pre-existing one. The only death made compensable by the hernia subsection in express terms is one *resulting from an operation* to treat in a surgical manner a hernia which did not pre-exist accidental injury or strain but resulted from one or the other. Death resulting from such operation is, in a succeeding subparagraph of the hernia subsection, expressly made compensable under the general provisions of the act. Death otherwise occurring, for example, one resulting from a hernia before an operation can be performed (*cf. Gulf States Creosoting Co. v. Walker*, 224 Ala. 104, 139 So. 261), is not compensable under the provisions of the hernia subsection. Such a death would not be compensable under the general provisions of the act because the hernia subsection has been held to apply to "all claims involving hernia" (*Bethlehem Steel Co. v. Zeigenfuss, supra*, 187 Md.

283), and when the legislature provided compensation for death resulting from a surgical operation to correct the hernia it excluded "by necessary implication" (18) recovery for deaths otherwise occurring. Therefore, dependents of such an employee would be denied all compensation. This, we respectfully submit, clearly demonstrates the iniquity of the manner in which the subsection has been construed and applied, and that it is so arbitrary, capricious and fundamentally unjust that it requires no further discussion to show its invalidity as herein contended.

It was petitioners' position below that their claims were not for a death resulting from the operation the hernia subsection refers to and requires, and consequently it did not and could not govern their claims since the facts were, as stipulated, that the deceased's death from cardiac collapse following his operation proximately resulted from an accidental injury aggravating or accelerating his existing infirmity of ventral hernia. Petitioners based their position on prior decisions of the court below affirming the rule of compensability under the general provisions of the act of claims resting on aggravation of existing herniæ, including *Baking Co. v. Wickham, supra,* (178 Md. 381, 388), where in 1940 the court below had affirmed the rule that if an accident "either accelerated an existing rupture or developed a strangulated hernia" it was compensable, and *Ross v. Smith,* 1935, 169 Md. 86, where the accident antedated the amendment of 1935, holding the hernia subsection inapplicable to a claim for resulting death, and the claim compensable under the general provisions of the act, where the aggravation of an existing hernia involved its strangulation.

In rejecting petitioners' position and expressly overruling its prior holding in the *Baking Company* case the court below applied the subparagraph containing the

strangulation proviso of 1935 to bar the claims and, as shown, construed the subparagraph as "excluding recovery for aggravation or acceleration of pre-existing herniæ, short of strangulation, by necessary implication." Thus although aggravation or acceleration involving strangulation and necessitating immediate operation is included and death resulting therefrom compensable, nevertheless, because the aggravation or acceleration of the deceased's existing hernia, while necessitating immediate operation, did not, as it could not, involve its strangulation, petitioners' claims were therefore, by force of the subparagraph as newly construed, relegated to the excluded class of claims resting upon aggravation or acceleration of pre-existing herniæ.

Thus the hernia subsection, under the construction and application of its subparagraph to bar petitioners' claims, divides into two classes all claims for compensation based on aggravation or acceleration of existing hernia by accidental injury or strain. On the one hand it commands the payment of compensation for those claims where the aggravation or acceleration involves strangulation necessitating immediate operation. On the other hand, as in the case at bar, it wholly excludes and denies compensation for those claims where the aggravation or acceleration of existing herniæ involves any resulting condition other than strangulation, albeit necessitating immediate operation and equally as disabling or potentially fatal as where strangulation occurs.

It is this discriminatory operation and application of the 1935 amendment to the subparagraph in question which has directly resulted in the denial to petitioners of the equal protection of the laws guaranteed them by the 14th Amendment. But for this unconstitutional construction of

the subparagraph, petitioners' claims are properly compensable under the general provisions of the act. And the excission of the invidious, as construed, proviso would leave unaffected the state's avowed policy and its legislative intent in respect of both pre-existing herniæ and their strangulation. *Cf., Ross v. Smith, supra,* 169 Md. 86.

The hernia subsection, in specifying for divisive treatment all claims for compensation for herniæ, creates a special class of claims and injuries constituting an exception to the general coverage by the act of claims, injuries and disabilities. Petitioners raise no question of the power of the state to make that classification. They contend, however, that the state may not, consistently with the guaranty of the equal protection clause, provide by further division and sub-classification that claims resting upon aggravation of existing herniæ shall be compensable only when such aggravation takes the form of strangulation, and wholly non-compensable when the aggravation takes another form equally as disabling or potentially fatal as where strangulation occurs.

It is submitted to be obvious that the further classfication thus made is discriminatory as being entirely without any basis in reason. From the aspect of workmen's compensation and the ends sought to be attained by statutes for its effectuation, there is not the slightest practical or logical difference or distinction between the two classes of aggravation or acceleration thus artificially created. They are intrinsically identical. A strangulated hernia is not a specific kind or type of hernia but one that has been aggravated or accelerated; it is merely a constricted hernia, which is but one condition of many equally critical conditions that may result from the aggravation or acceleration of many different kinds of herniæ. Herniæ resulting from

various causes, such as the incision hernia here (7), and in various stages of development, as that of the deceased here, cannot strangulate due to the peculiar physiological conditions of the protrusion, its size and position in the body, or the herniated tissue or muscle in their area, yet may and do strangulate when those conditions are different. To place a strangulated hernia in a class of its own, or to draw a line between strangulated herniæ and those otherwise affected by aggravation or acceleration, is to ignore or avoid concrete facts of medical science—to trifle in an unreal manner with anatomical realities. The only difference between the two classes of aggravation thus created is one of medical terminology.

The basic principle in respect of classification, often applied by this Court to various situations, is stated in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37, as follows:

> "* * * the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, * * * and that it applies to the exercise of all the powers of the state which can affect the individual or his property * * *. * * * the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * * That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

In *Skinner v. Oklahoma,* 316 U.S. 535, in holding unconstitutional as contravening the equal protection clause of the 14th Amendment a criminal sterilization law which discriminatorily classified crimes for whose conviction sterilization was authorized by the state, the Court, through Mr. Justice Douglas, noted that:

> "* * * the nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows close distinctions—* * * The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn."

The equally artificial line between the two supposed forms of aggravation disappears altogether when it is regarded from the view of medical science, with the result that the inequality of the subparagraph appears in bolder relief and the discrimination against petitioners by the application of this unequal law is more sharply etched. And when the alleged line of distinction fades the law must fall under the ban ot the Constitution, for the guaranty of equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo v. Hopkins,* 118 U.S. 356, 369. Again, it is not only the lack of distinction between classes but the want of relevance of the classification to the avowed ends of the statute that brands the subparagraph invalid. *Power Mfg. Co. v. Saunders,* 274 U.S. 490, 493-494; *Hartford Steam Boiler I. & Ins. Co. v. Harrison,* 301 U.S. 459, 461; *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.,* 262 U.S. 544; *Cotting v. Godard, Atty. Gen.,* 183 U.S. 79. In *Truax v. Corrigan,* 257 U.S. 312, 338, the Court said:

> "Classification * * * must regard real resemblances and real differences between things and persons, *and class them in accordance with their pertinence to the purpose in hand.*"

Palpably this subclassification of aggravation or acceleration of existing herniæ has no relevancy whatever to any purpose of the hernia subsection and its ultimate design, much less to the salutary ends sought to be achieved by workmen's compensation regarded as a whole. As shown, the purpose of the hernia subsection was stated in *Lloyd v. Webster, supra,* 1933, 165 Md. 574, 576 (quoted with approval in *Bethlehem Steel Co. v. Zeigenfuss,* 1946, 187 Md. 283, 288), as follows:

> "These special requirements in the Maryland statute are similar to those previously adopted in a number of other states,* to gain greater assurance that hernias compensated for have in fact resulted from accidental strains. The general provisions of the compensation statutes, it appears, had seemed to work unsatisfactorily, because previous accidental strains were sometimes inferred merely from the development of the hernias, when no strains had been reported or known. Occurrence of a strain would of course, be a fact peculiarly within the knowledge of the workman, and there could be no means of testing the truth of attribution of the hernias to strains if no strains had been reported at the time. * * *
>
> "This court construes the Maryland statute as intended to restrict compensation for hernia to accidents noticed and reported at or about the time of their occurrence. Throughout the requirements quoted, the accidental injury from which the time for reporting is to run is distinguished from the hernia attributed to it. * * *"

Thus the inquiry here must be directed to the crucial test of equality in law: Has the classification of resulting conditions or forms of aggravation of existing herniæ

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* Maryland is the only state in the union whose workmen's compensation act contains a hernia provision limiting compensation for aggravation of existing herniæ to cases where such aggravation involves strangulation and necessitates immediate operation.

any reasonable relation, or is it germane, to any purpose of the hernia subsection as declared by the court below? Will the classification provide "greater assurance that hernias compensated for have in fact resulted from accidental strains"? Or, does the classification provide "means of testing the truth of attribution of the hernias to strains"? Or, does it tend "to restrict compensation for hernia to accidents noticed and reported at or about the time of their occurrence"?

The obvious irrelevancy of the classification of aggravation to any avowed purpose of the hernia subsection or the act itself compels the conclusion that the state has arbitrarily attempted to make of the word "strangulated", in its relation to pre-existing herniæ, a fetish, and to attribute to it the authority and potency of a concise and accurate formula. But when the state's action is viewed in the light of the considerations properly bearing upon the validity of its act it seems inescapable that the classification is wholly without reason and consequently arbitrary if not capricious. And the presumption of validity attaching to the statute cannot overcome the utter frivolity of the subparagraph in making strangulation of an existing hernia the sole touchstone of the compensability of its aggravation, particularly when such aggravation in other forms is as dangerous as strangulation and can and does, as here, result in death.

No basis for the attempted distinction between forms of aggravation appears anywhere in the act or in the opinion of the court below, unless the expression "short of strangulation" may be taken to imply the existence of a difference. If it may be inferred from that expression that the legislature, or the court below in its construction of its act, found ground for the classification in the supposition that strangu-

lation resulting from aggravation of an existing hernia is a more serious or dangerous condition physiologically or anatomically than are other results of such aggravation, the stipulated facts of the case at hand in themselves completely dissipate that supposition and reveal in clearer light the rank discrimination to which petitioners have been subjected by the application of the subparagraph to bar their claims.

The court below, in holding that the legislature excluded recovery "for aggravation or acceleration of pre-existing herniæ, short of strangulation", plainly recognized the medical fact, indisputable at all events, that strangulation of an existing hernia is but one form or species of condition out of many which can and often do result from its aggravation or acceleration by accidental injury or strain. The equally indisputable medical fact is that these resulting conditions other than strangulation are equally as disabling and potentially fatal as is the condition of strangulation. For it is also a fact, of which there has been judicial notice and determination,* that aggravation or acceleration of existing herniæ may cause innumerable other dangerous forms of specific injury, known in medical terminology by either a definite name, such as an "incarcerated" hernia as the subparagraph as now amended mentions, or by general characterization referable to the precise condition which results.

As mentioned, the conceded facts at bar furnish in themselves conclusive proof that forms of aggravation or acceleration of existing herniæ other than those resulting in strangulation are at least equally as disabling and serious as where strangulation alone results from accidental injury

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* *Case of Harrington*, 285 Mass. 69, 188 N.E. 499; *National Auto. Insurance Co. v. Industrial Commission*, 139 Cal. App. 414, 34 P. 2d 163; *Staley v. Indianapolis Coal Co.*, 101 Ind. App. 335, 197 N.E. 713.

or strain. Other obvious instances could be multiplied indefinitely. For example, a watchman may be shot at the site of an existing inguinal hernia and the bullet pierce the protruding intestine without causing strangulation yet necessitating an immediate operation to effect its repair and save his life. Again, a worker may fall from a height and strike a sharp object with his body, piercing the protrusion of an existing epigastric or umbilical hernia, or any hernia of the *linea albae,* and causing an actual tear of the protruding bowel but no constriction as occurs in strangulation. Or the aggravation or acceleration may consist of any of the numerous forms or types of severe contusion, abrasion or laceration of the protruding organ or tissue, similarly as normal parts or unaffected organs of the human body may be so injured. Each of these is, as is strangulation, a form, condition or resulting involvement of aggravation or acceleration of existing herniæ, and would necessitate immediate operation to save life.

It is clear from all aspects, including those of nature and extent of injury and ensuing disability and possibility of fatal consequences, that there is no rational or valid line of difference and that none may be drawn between the resulting effects of strangulation of existing herniæ and their aggravation or acceleration in other respects necessitating an immediate operation. So that aside from the hernia subsection itself and the act as a whole, which, as is plain, furnish no foundation for the distinction which the state has here attempted to draw, there is not the slightest basis for inferring that the line of distinction drawn has any significance in any factor germane to the end and purpose of workmen's compensation.

What the state has here done is to lay an unequal hand on those who have sustained identical injuries, namely,

aggravation of existing herniæ, and to compensate one while barring others from all benefits.

Discrimination of this type is especially invidious in workmen's compensation statutes since they involve matters strongly affecting the public interest. Their constitutional validity was premised primarily on the social desirability that all cases of industrial injury, excepting those arising from self-inflicted injury, wilful misconduct, intoxication and the like, should be compensated in some degree, with both employer and employee conceding some rights and acquiring corresponding advantages.

When the workmen's compensation statutes were before this Court for the determination of their constitutional validity it was clearly contemplated that, other than in the mentioned instances where the injured or deceased employee himself occasioned his injuries, all disabilities and deaths resulting from accidental injuries arising out of and in the course of hazardous industrial employment were to be compensated. And in its construction of these acts this Court has always applied the rule that they are to be liberally interpreted in furtherance of the benign purposes for which they were enacted and so as to avoid incongruous or harsh results. *Industrial Comm. of Wisconsin v. McCartin*, 330 U.S. 622, 628; *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414.

In *New York Central R. Co. v. White*, 243 U.S. 188, in sustaining the constitutional validity of the workmen's compensation statute of New York, the Court, speaking through Mr. Justice Pitney, said:

> "* * * the statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the

employer's negligence, he is entitled to moderate compensation *in all cases of injury*, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. * * * The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. * * *

"* * * we recognize that the legislation under review * * * cannot be supported except on the ground that it is a *reasonable exercise* of the police power of the state."

In *Madera Sugar Pine Co. v. Industrial Acci. Comm. of Cal.*, 262 U.S. 499, in discussing the validity generally of workmen's compensation statutes, this Court, speaking through Mr. Justice Sanford, said:

"* * * These acts were sustained, in their entirety, * * * upon the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the *just and reasonable exercise* of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be charged against the industry after the manner of casualty insurance, and to that end require the employer *to make such compensation as may reasonably be prescribed* for the loss thus incurred in the common enterprise * * * to the injured employee or to his surviving dependents. * * *"

In *Mountain Timber Co. v. Washington*, 243 U.S. 219, in sustaining against attack based on the 14th Amendment the constitutionality of the workmen's compensation act of Washington, Mr. Justice Pitney, speaking for the Court, said:

> "* * * '* * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if *within the sphere of its operation it affects alike all persons similarly situated*, is not within the Amendment.' * * * the considerations to which we have adverted in *New York C. R. Co. v. White, supra*, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable *from the standpoint of natural justice*, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern * * *."

None of the statutes involved in those cases, nor other workmen's compensation enactments later coming before this Court for determination in particular respects, contained provisions singling out for special treatment claims for compensation for hernia, much less any provision such as contained in the subparagraph at bar by which it was attempted to deny by discriminatory classification claims resting upon aggravation of existing herniæ. In *New York Cent. R. Co. v. White, supra*, objection under the equal protection clause was made to the New York statute because of the exclusion from its coverage of farm laborers and domestic servants, and although the objection was not pressed the Court nevertheless discussed and disposed of it, saying that:

> "manifestly this cannot be judicially declared to be an *arbitrary* classification, since it *reasonably* may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."

To apply the rule of "reasonableness" here is to perceive at once the total lack of reason or justification for excluding from all benefits certain claims for compensation for aggravation of existing herniæ merely because they do not meet the arbitrary if not capricious and frivolous test of technical strangulation. In other cases involving state workmen's compensation acts this Court, while uniformly rejecting objections to such acts based on the equal protection clause, nevertheless found in every case both reason and justification for various kinds of classifications made by the states in the exercise of their police power.

In *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, wherein the Ohio act was challenged as creating an arbitrary and unreasonable classification of employers and employees in exempting from compliance with the act employers of less than five employees, this Court overruled the challenge only after finding that the classification was actuated by and based upon fair and reasonable considerations. In *Hawkins v. Bleakly*, 243 U.S. 210, where an employer contended he was denied the equal protection of the laws by a provision of the Iowa act, an elective statute, leaving his liability unaffected by an injured employee's rejection of the act, this Court, speaking through Mr. Justice Pitney, sustained the act because:

> "* * * We cannot say that there is here an arbitrary classification within the inhibition of the 'equal protection' clause of the 14th Amendment. All employers are treated alike, *and so are all employees;* * * * and the legislation cannot be condemned when that (police) power has been qualifiedly exercised, *without unreasonable discrimination.*"

In *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, in sustaining against an employee's attack, as violating the equal protection clause, a provision of the Texas act ex-

cluding from its coverage persons in specified vocations, this Court, in holding that the classification of employees was not arbitrary or unreasonable, stated that "in this case adequate grounds (for the classification) are easily discerned," and pointed out the specific grounds of and stated the reasons for each of the exclusions. Continuing, the Court, through Mr. Justice Pitney, said (p. 162):

> "* * * in order that the new scheme of compensation should be a success, the Legislature deemed it proper, if not essential, that the payment of compensation to the injured employes or their dependents should be rendered secure * * * by a system of compensation insurance in which it was deemed important that *all employees of a given employer should be treated alike.* Still further there are reasons affecting the contentment of the employes and the discipline of the force, rendering it desirable that *all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment.* * * *"

In *Arizona Copper Co. v. Hammer*, 250 U.S. 400, in stating the underlying reasons for holding valid the Arizona Employers' Liability act under the due process and equal protection clauses of the 14th Amendment, the Court emphasized that a state could recognize or establish "a right of action for compensation to injured workmen *upon grounds not arbitrary or fundamentally unjust*," and speaking through Mr. Justice Pitney said:

> "The rule being based upon reasonable grounds affecting the public interest, being established in advance and *applicable to all alike under similar circumstances*, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment."

And in *New York Central R. Co. v. Bianc*, 250 U.S. 596, wherein employers claimed violation of due process by a provision of the New York act authorizing awards of compensation for disfigurement in circumstances claimed to be irrelevant to impairment of earning power, this Court sustained the act because the result achieved was "not inconsistent with fundamental rights" and the provision "not unreasonable, arbitrary or contrary to fundamental right."

See also:

R. E. Sheehan Co. v. Shuler, 265 U.S. 371;
Staten Is. R. T. Co. v. Phoenix Indemnity Co., 281 U.S. 98;
Ward & Gow v. Krinsky, 259 U.S. 503.

This Court, in thus sustaining the validity of workmen's compensation laws, implied no sanction to the exercise of state power to whittle down by means of invidious classification and discriminatory exclusion the reciprocal benefits which these statutes give employees in return for their yielding up of many of their existing rights. State power to enact and apply exclusionary provisions relating to claims for compensation for herniæ has never been determined much less admitted by this Court, yet the assumption that it exists carries with it no implication that the state may employ it to exclude from all benefits a large segment of claims for compensation with which herniæ may be but remotely involved.

Whether or not actuated by an impulse "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business" *(cf., Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 59), there has nevertheless been permitted to creep into the Maryland act a malignant provision which, by a process of discrim-

inatory classification, effectively discompensates a substantial if not the greater part of all claims resting upon *aggravation or acceleration* of existing herniæ. And this under the guise of an ostensible purpose "to restrict *compensation for hernia* to accidents noticed at or about the time of their occurrence."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its powers of review, under the authority hereinabove cited, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Court of Appeals of Maryland and finally reverse it.

Respectfully submitted,

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Baltimore, Maryland,
June 6, 1949.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. [redacted] 106

MARY E. DOYLE, Widow, and ANNIE E. DOYLE,
Mother of
BERNARD C. DOYLE,
Deceased,

Petitioners,

vs.

THE LORD BALTIMORE HOTEL COMPANY,
Employer
and
LIBERTY MUTUAL INSURANCE COMPANY,
Insurer,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TALBOT W. BANKS,
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The Daily Record Co., Baltimore 3, Md.

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No. 850

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW

The opinion of the Court of Appeals of Maryland (15-18)* has not as yet been officially reported in the Maryland Reports. However, this opinion, which was filed on March 10, 1949 (87), has been published in 64 A. 2d 557.

* All page references, unless otherwise indicated, are to the printed transcript of record.

The memorandum opinion of the Baltimore City Court (Sherbow, J.), the intermediate tribunal, appears at pages 9 to 14 of the transcript, and the decision of the State Industrial Accident Commission of Maryland, the tribunal of first instance, also appears in the transcript, pages 1 and 2.

II.

JURISDICTION

Respondents respectfully submit that there is no proper basis for the attempt of the petitioners to invoke the jurisdiction of this Court as no federal question was seasonably raised in the state courts. It is apparent from the record that it was not until after the decision of the Court of Appeals of Maryland had been filed on March 10, 1949, that, for the first time, an assertion was made by the petitioners that the case involved a question pertaining to their rights guaranteed by the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. This assertion was made by a motion for reargument (19-86), filed on April 9, 1949, and overruled without opinion on April 26, 1949 (87).

Respondents further submit that, in any event, the case presents no such substantial federal question as, even if seasonably raised, would justify this attempt to invoke the jurisdiction of this Court. A review of the subject matter with which this case deals and of the state statutes and judicial decisions it concerns clearly reveals that the assertion that the petitioners have been denied equal protection of the laws in contravention of the Fourteenth Amendment is without foundation in fact or law.

A more detailed discussion of these considerations relating to jurisdiction appears under heading V, Argument, at page 6 of this brief.

III.

STATUTES INVOLVED

This case involves a claim for compensation benefits under the Workmen's Compensation Act of Maryland (Article 101, Code of Public General Laws of Maryland). As the injury occurred on June 12, 1947 (5), the provisions with which the case is chiefly concerned are those contained in Flack's 1947 Cumulative Supplement to the Annotated Code of Maryland, pages 1891 to 1969, inclusive.

The Maryland statute is a compulsory compensation act. It provides for the payment of benefits in two main classes of cases, an enumerated schedule of occupational diseases contracted due to specified causes involving exposures to injurious substances (Article 101, Sections 21 to 30, incl.), and disabilities resulting from accidental injury "arising out of and in the course of * * * employment" (Article 101, Section 14).

Among the various classes of disability due to accident covered by the Maryland Act is permanent partial disability, which is particularly covered by Article 101, Section 35, Subsections (3), (4) and (5). These provisions set up a schedule of amounts to be paid for the loss or loss of use of various specified members of the body, provides compensation for other permanent partial disabilities of a similar character but not specifically covered in the schedule, provides for compensation for disfigurements, and, in Subsection (5), special provision is made for claims involving herniæ and their consequences.

The subsection dealing specifically with hernia cases, Section 35 (5), Article 101, Flack's 1947 Cumulative Supplement, is as follows:

"(5) In all claims for compensation for hernia, compensation may be allowed only upon definite proof to the satisfaction of the Commission:

"First. That there was an accidental injury causing hernia, arising out of and in the course of the employee's employment; or that the claimant sustained a hernia resulting from a strain arising out of and in the course of his or her employment.

"Second. That the hernia did not exist prior to the injury or strain for which compensation is claimed; provided that if as the result of an accidental injury, or as the result of a strain, arising out of and in the course of the employee's employment a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply.

"Third. That, anything in this Article respecting notice to the contrary notwithstanding, such injury or strain was reported to the employer within fifteen days next following its occurrence.

"All hernia, inguinal, femoral or otherwise, so proven to be the result of such injury or strain, shall be treated in a surgical manner by operation whenever practicable. If death results from such operation, the death shall be considered as a result of the injury or strain, and compensation paid in accordance with the provisions of this section. In non-fatal cases, time loss only shall be compensated, provided, however, that in computing lost time there shall not be included any time lost from delay in the holding of a hearing when such delay shall have been occasioned at the request, or by the fault, of the claimant, unless it is shown by special examination that the injured employee has a permanent partial or permanent total or temporary total disability resulting from the operation. If so, compensation shall be paid in accordance with the provisions of this Article, with reference to perma-

nent partial disability or permanent total or temporary total disability as the case may be.

"In case the injured employee refuses to undergo an operation for the cure of the said hernia he shall be allowed compensation for a period of seven and one-half (7½) weeks, and if it be shown to the satisfaction of the Commission that because of age or previous physical condition, it is considered unsafe for the employee to undergo such operation, such refusal may be excused by the Commission, in which event the employee shall be allowed compensation for the period of actual disability resulting from such hernia, not to exceed fifty-two (52) weeks, and in either event such payment shall be in lieu of all benefits for or on account of disability or death resulting or alleged to have resulted from such injury."

IV.

STATEMENT OF THE CASE

The facts in this case are undisputed and are stipulated (4-8).

About four years prior to June 12, 1947, petitioners' decedent developed a post-operative ventral hernia, non-occupational in origin. The hernia gradually became enlarged during the two years immediately following its inception but the decedent elected not to have it corrected by surgery.

On June 12, 1947, while at work, the decedent fell, striking this pre-existing hernia which then became swollen and painful. On the advice of his family physician, the decedent arranged for an operation to correct the hernia. The operation was performed on June 21, 1947, and, about half an hour after the operation, the decedent underwent a fatal cardiac collapse.

It is uncontested that there was no strangulation of this pre-existing hernia. In fact, strangulation of a ventral hernia, due to its structure and location, is stated at page 6 of the petition in this case to be "physiologically impossible".

Claim for compensation benefits for dependency was filed with the State Industrial Accident Commission of Maryland. Following a hearing, the Accident Commission found, on issues raised under the provisions of Article 101, Section 35 (5), that, while the decedent had sustained an accidental injury, his hernia had pre-existed the accident and had not become so strangulated as to require an immediate operation. Therefore, it found that the claim was not compensable (1-2).

A statutory appeal under Article 101, Section 57, was prosecuted on behalf of petitioners to the Baltimore City Court. There the case was tried on an agreed and stipulated statement of facts (3, 4-8) and the decision of the Accident Commission was reversed (3, 9-14).

Respondents thereupon filed an appeal to the Court of Appeals of Maryland (3, 87) under Article 101, Section 57. On March 10, 1949, the Court of Appeals reversed the judgment of the lower court, and its opinion (15-18) was filed on the same date (87).

Petitioners, on April 9, 1949, filed motion for reargument which, on April 26, 1949, was overruled by the Court of Appeals without opinion (87).

V.
ARGUMENT

There is no proper basis for petitioners' attempt to invoke the jurisdiction of this Court as:

A. No federal question was raised in the state courts until the motion for reargument was filed following the

rendition of the decision by the Court of Appeals of Maryland, the state court of last resort; and

B. No substantial federal or constitutional question is involved in this case as the state statute, in establishing the various requirements for the compensability of claims involving herniæ, does not deny equal protection as it bases its distinctions upon considerations of factual difference and establishes classifications which need and experience have demonstrated to be reasonable and proper and relevant to the purposes of the legislation; and

C. Even if the special proviso of the statute were invalid, as petitioners assert, the general statutory provision excludes petitioners' claim; and

D. Equal protection of the laws is not denied by the abolition of a common law remedy.

Point A

There is no proper basis for petitioners' attempt to invoke the jurisdiction of this Court as the federal question was not seasonably raised in the state courts below.

Petitioners, seeking to invoke the jurisdiction of this Court to review the decision of a state court of last resort, alleging that the state court's decision has deprived them of equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States have the burden of demonstrating by the record that such a question was seasonably raised in the state court below. *Crowell v. Randell*, 10 Pet. 368; *Railroad Co. v. Rock*, 4 Wall. 177, 180; *Olympia Mining Co. v. Kerns*, 236 U. S. 211, 215; *Rooker v. Fidelity Trust Co.*, 261 U. S. 114, 116; *McGarrity v. Delaware River Bridge Comm.*, 292 U. S. 19, 20; *Bailey v. Anderson*, 326 U. S. 203, 207.

An examination of the record in this case fails to disclose that any contention as to the alleged denial of equal protection was made prior to the decision of the Court of Appeals of Maryland on March 10, 1949 (87), except for the bare, unsupported statement in the motion for reargument, subsequently filed in that Court, that during oral argument, counsel had stated that if the hernia provision (Article 101, Section 35 (5)) were interpreted as denying compensation in this case, "the provision would be unconstitutional" (27).

Even assuming that such contentions were made in oral argument addressed to the court below, "* * * if the record does not show that they were necessarily drawn in question, this Court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument" (*Railroad Co. v. Rock*, 4 Wall. 177, 180). And, in any event, where the claimed federal question is a constitutional one, the specific provision of the Constitution must be cited below. A mere general claim of unconstitutionality is not sufficient to satisfy the requirement that the federal questions have been presented to the state court. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *New York Central Etc. R. Co. v. City of New York*, 186 U. S. 269; *Harding v. Illinois*, 196 U. S. 78; *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36; *Herndon v. Georgia*, 295 U. S. 441.

The record shows that a federal or constitutional question was first specifically raised in this case in the motion for reargument (19-86) filed in the Court of Appeals of Maryland almost a month after its decision (87). This motion was overruled without opinion (87). Except under extraordinary circumstances of a character not present herein, a federal claim first asserted in a motion for reargument

filed in a state court is raised too late to serve as a basis for seeking review of the state decision by this Court. *Godchaux Co. v. Estopinal*, 251 U. S. 179, 181; *American Surety Co. v. Baldwin*, 287 U. S. 156, (No. 3), 162-164; *Herndon v. Georgia*, 295 U. S. 441, 443.

It is, of course, well recognized that if the state court, after final judgment, actually entertains a motion for reargument wherein the federal question is first asserted and decides the point, the question is no longer foreclosed and may be raised in seeking to invoke the jurisdiction of this Court. See *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, and cases cited therein. However, there is nothing in the record in this case to show that the Court of Appeals actually entertained and decided the asserted constitutional questions. It overruled the motion for reargument without opinion (87).

In a letter to counsel for petitioners, the Clerk of the Court of Appeals stated "that the Court has considered your motion * * * and has overruled the motion under date of April 26, 1949" (87). It is to be noted that this is not a statement or opinion of the court, itself, but, even if so considered, statements that a state court has "considered" or "maturely considered" or given "due consideration" to a motion for reargument wherein federal questions are for the first time raised do not suffice to show that the court has passed on the question. They merely constitute a denial of the motion. *McCorquodale v. Texas*, 211 U. S. 432; *Forbes v. State Council of Virginia*, 216 U. S. 396, 399; *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334; *St. Louis & San Francisco R. Co. v. Shepherd*, 240 U. S. 240, 241.

If it can be demonstrated that a federal or constitutional question first arose at the close of the proceedings in the

state court, such as by its sudden and unanticipated action in reversing itself on a procedural matter, thus debarring a litigant to an opportunity to present his case, as in *Saunders v. Shaw*, 244 U. S. 317, 320, or by unexpectedly reversing its previous construction of a statute or regulation, thereby for the first time threatening a litigant's rights under the federal Constitution, as in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 678; *Great Northern Ry Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 367; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, the new and unexpected grounds for assertion of a federal question may be first raised in a motion for reargument. Under such circumstances, their assertion is not unseasonably made.

Apparently, petitioners principally rely on this exception to the general rule in seeking to invoke the jurisdiction of this Court. They insist that, prior to the entry of judgment of the Court of Appeals on March 10, 1949, they confidently relied on the assumption that the hernia subsection (Article 101, Section 35 (5)), although it specifically stated that a claim involving a pre-existing hernia would be compensable only if it were shown that the accidental injury or strain caused a strangulation requiring an immediate operation, had no application to the present case. It is admitted that this case involves a non-strangulation pre-existing hernia. The petitioners assert, however, that it was their belief that this section applied only to render such strangulation compensable, while, on the other hand, simple aggravation of a pre-existing hernia was compensable "under the general provisions of the act * * *" (petition, p. 4). This interpretation, they further allege, was the law of Maryland as declared by the Court of Appeals in *G. L. Baking Co. v. Wickham*, 1940, 178 Md. 381, and they cite particularly the language of that decision at page

388, where it was stated that the claim, which was held compensable, involved an accident which "accelerated an existing rupture or developed a strangulated hernia". Furthermore, they say, this interpretation was confirmed by the citation of the *Wickham* case and quotation of the language noted above in *Bethlehem Steel Co. v. Ziegenfuss*, 1946, 187 Md. 283, 287. Therefore, it is petitioners' contention that the decision of the Court of Appeals in the present case was a totally unexpected reversal of the previously declared applicable law and, that they could not have anticipated such an outcome, with its alleged infringement of their constitutional rights, in time to have asserted the federal question more promptly than in a motion for reargument.

Respondents submit that this line of argument is completely without legal foundation. The *Wickham* case, 178 Md. 381, involved a claim for a strangulated hernia which developed following an injury. It was shown that the employee had a soreness or predisposition to hernia before the accident. The applicable statutory requirements of compensability, in that case, as embodied in the Session Laws of Maryland, 1935, Chapter 487, were substantially the same, as far as pre-existing herniæ were concerned, as those applicable here. Therefore, this case actually decided that, under a statute providing that a pre-existing hernia caused to strangulate by reason of an accidental injury was compensable, a claim meeting these requisites was compensable. The case was not concerned with, hence could not be authority for the compensability of a simple aggravation of a pre-existing hernia.

In November, 1946, over six months before the accidental injury in the present case, and almost two years before the appeal was taken to the Court of Appeals of Maryland, that tribunal handed down its decision in *Bethlehem Steel Co.*

v. Ziegenfuss, 187 Md. 283. The facts in the *Ziegenfuss* case were strikingly similar to those herein for that case involved a claim for an aggravated pre-existing condition, variously diagnosed as a relaxed muscle or post-operative hernia. The employee had fallen at work and thereafter the pre-existing lump became enlarged and painful. It was then found that the employee had an unstrangulated hernia.

The Court of Appeals, in the *Ziegenfuss case* (supra), carefully reviewed the background of the applicable hernia provision (the same as was involved in the *Wickham* case (supra) and substantially the same as applicable herein), pointing out that "cases involving hernia constitute an exception to the usual type of cases under the Workmen's Compensation Act" (187 Md. 283, 286). They are exceptions to the general rule, said the court, because of the special statutory prerequisites to compensability of such claims, including the requirement that it be shown that the hernia, if unstrangulated following the injury, was not a pre-existing condition (187 Md. 283, 289). Since this requirement had not been met, the claim was held non-compensable.

The factual background and the decision in the *Ziegenfuss* case (supra) have been reviewed at some length herein because of the obviously direct and controlling authority of that decision on the claim prosecuted by the petitioners in the tribunals below. Here, not only was it not shown that the hernia was not pre-existing, but it was uncontested that it had existed before the injury and was not thereby caused to strangulate. As the Court of Appeals of Maryland stated, the contention of the petitioners that the statutory provision did not apply to a mere aggravation, without strangulation, of a pre-existing hernia, was "foreclosed by our recent decision in *Bethlehem Steel Co. v. Ziegenfuss* (supra)" (17).

In view of the clear language of Article 101, Section 35 (5), particularly as it had been construed and applied in the *Ziegenfuss* case (supra) two years before the present case came before the Court of Appeals, it is perfectly apparent that the Court of Appeals, in applying the statutory provision and following its *Ziegenfuss* decision was inaugurating no new and startling departure from established precedents. On the contrary, it was following a clearly stated and well established authority. There was, then, no such new construction of the statute unexpectedly announced such as is claimed to have caused an unanticipated threat to constitutionally guaranteed rights. If such rights are threatened, the possibility of such infringement was as apparent before the Court of Appeals handed down its decision as it was thereafter.

Herndon v. Georgia, 295 U. S. 441, involved a contention similar to that urged by the petitioners herein. No specific federal question was raised until after the state court of last resort had decided the case, following the authority of a prior decision handed down before the *Herndon* case came before that court. A motion for rehearing was thereafter filed on Herndon's behalf, asserting that the statute as construed violated his rights guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the question was raised too late, that the outcome of the proceedings could not be claimed to be unanticipated for ignorance of the prior decision could not be pleaded. Herndon "* * * was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review hereby appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, * * *" (295 U. S. 441, 446).

The parallel between the contention of petitioners herein and that discussed in the *Herndon* case is too obvious to require comment.

It is submitted, therefore, that a federal question was not seasonably raised in this case and, accordingly, that there is no proper basis for petitioners attempt to invoke the jurisdiction of this Court.

POINT B

No substantial federal or constitutional question is involved in this case. The state statute, alleged to infringe the guarantee of equal protection, validly establishes requirements for compensability of claims involving herniae, basing the statutory distinctions upon factual differences.

The classification is reasonable and proper in the light of need and experience and is relevant to the purposes of the legislation.

Respondents respectfully submit that there is no such federal or constitutional question presented herein to justify this attempt to invoke the jurisdiction of this Court.

The state statute, which is attacked as repugnant to the equal protection clause of the Constitution of the United States, by its specific terms and as construed by the Court of Appeals of Maryland, classifies compensation claims involving hernia as in a category separate and distinct from other classes of cases arising under the general provisions of the statute (Article 101, Section 35 (5); *Lloyd v. Webster*, 165 Md. 574; *Ross v. Smith*, 169 Md. 86; *Bethlehem Steel Co. v. Ziegenfuss*, 187 Md. 283). Specifically differentiated from other types of cases arising under the Workmen's Compensation Act, claims involving herniæ are subject to three definite prerequisites or conditions to test their compensability. Petitioners herein assert that one of these special

conditions, that requiring proof that the hernia did not exist before the injury or strain or, if admittedly pre-existent, that it be shown to have become so strangulated by reason of such accident or strain as to require an immediate operation, is unreasonable, arbitrary and operates to deny to them equal protection of the laws.

The mere fact that legislation classifies or establishes categories in the subject matter with which it deals obviously does not render it objectionable upon constitutional grounds. *Radice v. New York*, 264 U. S. 292, 296. This Court, in passing upon the validity of state workmen's compensation legislation, in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576 and 577, said:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond legislative authority. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them and what shall be excluded."

See also: *New York Central R. R. Co. v. White*, 243 U. S. 188; *Hawkins v. Bleakley*, 243 U. S. 210; *Mountain Timber Co. v. Washington*, 243 U. S. 219; *Cudahy Packing Co. v. Parramore*, 263 U. S. 418; *Lower Vein Mining Co. v. Industrial Board*, 255 U. S. 144.

A statutory classification is not "arbitrary and unreasonable" if it makes distinctions between matters which are dissimilar. State legislatures may set apart classes and

types of problems according to requirements or considerations suggested by experience and observation. *Bryant v. Zimmerman*, 278 U. S. 63; *Bain Peanut Co. v. Pinson*, 282 U. S. 499, 501; *Truax v. Raich*, 239 U. S. 33, 41; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. "The Constitution does not require things which are different to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147; *Groesaert v. Cleary*, 335 U. S. 464, 466. "* * * Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed a denial of equal protection if any state of facts could be conceived to support it. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 501, and cases cited." *Asbury Hospital v. Cass County*, 326 U. S. 207, 215. See also *Sage Stores Co. v. Kansas*, 323 U. S. 32.

Maryland, in evolving its legislative policy with regard to compensation claims, determined that experience demonstrated that claims involving herniæ differed materially from other classes of cases and required special statutory treatment. This is illustrated by the following language from the opinion of the Court of Appeals of Maryland in *Lloyd v. Webster*, 165 Md. 574, 576:

> "These special requirements in the Maryland statute are similar to those previously adopted in a number of other states, to gain greater assurance that hernias compensated for have in fact resulted from accidental strains. The general provisions of the compensation statutes, it appears, had seemed to work unsatisfactorily, because previous accidental strains were sometimes inferred merely from the development of the hernias, when no strains had been reported or known. Occurrence of a strain would of course, be a fact peculiarly within the knowledge of the workman, and there could be no means of testing the truth of attribution

of the hernias to strains if no strains had been reported at the time. Further, medical testimony had cast considerable doubt on the possibility of traumatic cause of hernias."

See also: *Bethlehem Steel Co. v. Ziegenfuss,* 187 Md. 283, 286-290; *Singleton, Workmen's Compensation in Maryland,* The Johns Hopkins University Press, 1935, pp. 24-25; also opinion of the Court of Appeals in the present case (15, 17).

Special statutory requirements of proof to establish compensability of claims involving herniæ are common to the compensation laws of many states. This is particularly to be noted with regard to the requirement that it be shown that the hernia did not exist before the injury or accident for which compensation is claimed. As stated in *Schneider's Workmen's Compensation* (Permanent Edition), Sec. 1473, Vol. 4, at page 581 et seq.:

> "The Workman's Compensation Acts of 19 states contain specific provisions barring compensation in cases in which a hernia existed in any degree prior to the injury. In states wherein there are no statutory provisions to the contrary, it has been held that a strain resulting in aggravation of a previous hernia constitutes an 'accident' and is compensable."

Annotated to this comment are the references to the pertinent statutory provisions of the various states which bar recovery under such circumstances.

Reasons strikingly similar to those expressed by the Court of Appeals of Maryland for the apparent need for special statutory provisions dealing with hernia claims are set forth in the decisions of the courts of other jurisdictions. For example, *Jordan v. State Commissioner,* 120 W. Va. 142, 144, discussing this problem, states:

> "* * * The reason for the statute is not difficult to perceive. A great many people are afflicted with this ailment, and physical labor of any character tends

> to bring about an acute attack. If all aggravations of hernia were made compensable, it would result in the payment of compensation in many cases where no particular injury was sustained from other than ordinary labor as distinguished from accidents or other unusual occurrences. The legislature evidently had this in mind and presumably intended to draw a line between such hernia as was compensable and such as was not, and used the statute quoted for that purpose * * *"

See also: *O'Brien v. Wise & U. Co.*, 108 Conn. 309; *Arduni v. General Ice Cream Co.*, 123 Conn. 43; *Aniel v. Compensation Commissioner*, 112 W. Va. 645; *Mirific Products Co. v. Industrial Commissioner*, 356 Ill. 645; *Wagner Malleable Iron Co. v. Industrial Commissioner*, 358 Ill. 93.

Such widespread recognition of the special problems arising in connection with claims involving hernia and of the need for special statutory treatment thereof is definite confirmation of the existence of a basis for legislative action. *Daniel v. Family Insurance Co.*, 336 U. S. 220, 223; *Lower Vein Mining Co. v. Industrial Commission*, 255 U. S. 144.

It has been urged by petitioners in this case that, in providing that a pre-existing hernia caused to become aggravated by accident or strain is non-compensable while one so caused to become strangulated is within the scope of coverage afforded by the act, the subsection in question (Article 101, Section 35 (5)) unreasonably and arbitrarily discriminates between essentially similar matters. Petitioners assert that the operation of the statute in this case is to be likened to that before this Court in *Skinner v. Oklahoma*, 316 U. S. 535. This contention, however, is based on the mistaken premise that there is no difference between an "aggravated" hernia and one which is "strangulated".

The groundlessness of the assumption of identity of the two conditions is readily apparent from the definition of the terms employed. "To *aggravate* is etymologically to increase in weight, hence in gravity, severity or intensity. A disease * * * may become aggravated." (*Funk and Wagnalls, New Standard Dictionary,* 1949, Vol. I, p. 53. See also: *The New Century Dictionary,* 1936, Vol. 1, p. 24; *The Oxford English Dictionary,* 1933, Vol. 1, p. 180.) Thus, a condition which is said to be "aggravated" is the same condition in a more severe or intense form. The term is a non-technical one in general usage and, as applied to a physical disability, obviously means no more than an increase in degree of severity rather than a change in essential or intrinsic character. On the other hand, "strangulated" is defined as "constricted to such a degree as to have its circulation cut off; characterized by such constriction; as a strangulated hernia". (*Funk and Wagnalls, New Standard Dictionary,* 1949, Vol. II, p. 2393; see also *The New Century Dictionary,* 1936, Vol. III, p. 1860; *The Oxford English Dictionary,* 1933, Vol. X, p. 1082). The term is a technical medical designation of a definite, characteristic condition (*Gould's Medical Dictionary* (Fourth Edition), p. 602). It is not a mere change of degree, but a change in the character of the pre-existing condition.

The distinction between an "aggravated" hernia and a "strangulated" hernia is further illustrated by the medical commentataries on the subject. As to a claim of aggravation of a hernia, it is said:

> "* * * The claim that a pre-existing hernia had been aggravated by a strain cannot be proved or disproved by physical examination."
>
> *Reed & Emerson, The Relation Between Injury and Disease,* (1938 Ed.), page 290.

On the other hand, in *Kessler, Accidental Injuries, (Second Edition)*, it is said at page 424:

> "Strangulation of an existing hernia is considered a definite accident without any regard to the previous existence of the hernia";

and at page 414:

> "In case of strangulation, with the obvious necessity of surgical interference, Imbert considers the refusal of a man to be operated upon as next to suicide, * * *."

In *Gray's Attorneys' Textbook of Medicine, (Second Edition)*, at page 778, it is said:

> "Strangulation is a grave surgical emergency, necessitating prompt action to relieve the condition * * *."

Thus is it apparent that the terms "aggravated" and "strangulated", as applied to herniæ, are definitely not synonymous or interchangeable as petitioners suggest, but have widely different meanings, the former being general, the latter specific. While the general term "aggravated hernia" may be broad enough to include within its scope the specific condition designated as "strangulated hernia", the converse obviously is not true. Clearly, under the definitions discussed above, not all herniæ which become aggravated in severity or degree are "so strangulated that an immediate operation is necessary", as is required for compensability under Article 101, Section 35 (5).

In dealing with the problem of compensability, the Legislature of Maryland was clearly distinguishing between differing factual situations when it provided that a hernia caused to become "strangulated", requiring an immediate operation, should be compensated and, in effect, excluded a hernia which is merely claimed to have become "aggravated". While difficulty of medical proof or disproof make

it difficult to determine if a simple aggravation has occurred, a strangulation is a readily determinable and gravely critical condition. Thus, the distinction is relevant and appropriate to the legislative purpose that there be "greater assurance that hernias compensated for have in fact resulted from accidental strains". *Lloyd v. Webster*, 165 Md. 574, 576.

The criticism aimed by petitioners at the legislative policy in dealing with cases of this character, when that policy is considered in the light of the considerations leading to its adoption and the factual differences upon which it is based, appears to be aimed at its wisdom or desirability rather than at its constitutional validity. The same observation appears to be equally applicable to the criticism directed at the construction placed upon the statute by judicial decision. This Court has repeatedly declared, however, that whether or not particular legislation may be deemed the most desirable or wise is not the test to be applied in determining its constitutionality. So long as they "do not run afoul of some specific constitutional prohibition * * *", the legislatures of the states have the power to determine and declare matters of policy. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536. See also *Daniel v. Family Insurance Co.*, 336 U.S. 220, 225; *Kotch v. Pilot Commissioners*, 330 U.S. 552. And it is equally well established that the construction placed upon a state statute, dealing with a state matter, by a state court of last resort is not a proper subject for requested review by this Court. *Quong Ham Wah Co. v. Industrial Commission*, 255 U.S. 445, 448; *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 422; *Ward & Gow v. Kunsky*, 259 U.S. 503, 510.

Seeking to illustrate what they assert to be the arbitrary and unreasonable characteristics of the hernia subsection,

petitioners suggest a series of hypothetical situations which, they assert, would not be adequately covered by the statute. "Under our constitutional system, the States in determining the reach and scope of particular legislation need not provide abstract symetry," *Patsone v. Pennsylvania*, 232 U.S. 138, 144; and "* * * the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as it means allow." *Buck v. Bell*, 274 U.S. 200, 208. In any event, hypothetical problems and speculations are irrelevant to a determination of whether petitioners have been denied a constitutionally guaranteed right. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 84-85; *Asbury Hospital v. Cass County*, 326 U.S. 207, 213, 214; *Lower Vein Mining Co. v. Industrial Board*, 255 U.S. 144, 148.

Respondents respectfully submit that it is apparent that the Maryland Legislature, in establishing a classification of hernia claims, and imposing conditions of compensability upon the various types of such cases, was exercising its judgment upon considerations of factual differences and requirements suggested by experience and observation and relevant to a proper legislative purpose.

> "It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone v. Pennsylvania*, 232 U.S. 138, 144; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198, 199; *Metropolitan Casualty Insurance v. Brownell*, 294 U.S. 580, 586 * * *."
>
> *Railway Express Agency v. New York*, 336 U.S. 106, 110.

POINT C

Even if the special proviso of the statute were invalidated, petitioner's claim would be barred by the exclusions of the statute.

Petitioners, at page 25 of their brief, apparently concede that there "is no question of the power of the state" to classify claims for compensation for herniæ as in a class separate and apart from claims for other injuries and disabilities under the general provisions of the statute. They assert, however, that equal protection is denied them as the statute distinguishes between claims for pre-existing herniæ caused to strangulate by injury and strain and those caused merely to become aggravated. This is said to constitute an unreasonable discrimination repugnant to the guarantees of the Fourteenth Amendment.

The general language of the second prerequisite of compensability contained in Article 101, Section 35 (5) creates a broad exclusion of all claims for pre-existing herniæ. Immediately following this general provision is the language "* * *; provided that if as the result of an accidental injury * * * or of a strain * * * a pre-existing hernia becomes so strangulated that an immediate operation is necessary, the provision of this sub-paragraph requiring proof that hernia did not exist prior to the injury for which compensation is claimed shall not apply." By thus specially excepting claims involving strangulated herniæ from the operation of this sub-paragraph, the legislature has clearly engrafted a special proviso on the preceding exclusionary language modifying its effect to the extent outlined therein. See *United States v. Morrow*, 266 U. S. 531; *McDonald v. United States*, 279 U. S. 12; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174; *Johns v. Hodges*, 82 Md. 525.

Even if it be assumed that there is contained within this special proviso such an arbitrary and unreasonable discrimination between classes of hernia claims as to constitute a denial of equal protection of the laws, as petitioners assert, the invalidation of this proviso will not serve to render petitioners' claim compensable. The statutory provision rendering strangulated herniæ compensable and removing them from the general exclusion of all pre-existing herniæ is clearly severable from the general exclusionary enactment. Its deletion from the statute obviously would not be contrary to the legislative intent that claims involving pre-existing herniæ shall be non-compensable. Where an invalid portion of statute is thus severable from the rest, the portion which is constitutional remains unaffected by the rejection of the invalid provision. *Frost v. Corporation Commission*, 278 U. S. 515, 525, and cases cited therein; *Maryland Unemployment Compensation Board v. Albrecht*, 183 Md. 87.

Maryland first imposed special conditions for compensability of hernia claims by the adoption of the statute contained in Session Laws of Maryland, 1931, Chapter 363. Under this provision, six prerequisites of compensability were established, the fifth being a requirement that it be shown "that the hernia did not exist before the injury for which compensation is claimed". These requirements were subsequently modified by the provision contained in Session Laws of Maryland, 1935, Chapter 487. The 1935 statute, which is substantially the same as that involved in the present case, reduced the conditions of compensability to three, retained the exclusion as to pre-existing herniæ and added the proviso excepting therefrom claims for strangulated herniæ. Thus, in effect, the proviso in question was added by amendment and, therefore, clearly is severable

from the general provision it modifies. *Frost v. Corporation Commission*, supra; *Reitz v. Measley*, 314 U. S. 33, 39.

If the proviso which removes the bar of the exclusion of claims for pre-existing herniæ from application to such herniæ caused by accident or strain to strangulate were deleted from the statute, the requirement that it be shown "that the hernia did not exist prior to the injury or strain for which compensation is claimed" would remain to exclude, by its express terms, the claim involved in the present case. Therefore, it is respectfully submitted that it has not been shown by petitioners that the invalidation of the proviso of which they complain would afford to them the relief to which they claim to be entitled.

POINT D

Equal protection of the laws is not denied by the abolition of a common law remedy.

Petitioners also assert that, since the effect of the Maryland Act is to bar a right to proceed at common law against the employer for damages on the theory of negligence, (*State, use of Wilson v. North East Fire Brick Co.*, 180 Md. 367, 371), the application of the hernia subsection to bar their claim deprives them of a remedy. It is respectfully submitted that under the agreed facts in this case (4-8) it is perfectly apparent that no basis for such a common law suit is demonstrated or even suggested. Aside from such considerations, however, equal protection of the laws is not denied by the state's abolition of a common law remedy. *New York Central R.R. Co. v. White*, 243 U.S. 188; *Northern Pacific R. Co. v. Meese*, 239 U.S. 614; *Silver v. Silver*, 280 U.S. 118.

VI.

CONCLUSION

As a federal or constitutional question was not seasonably raised or passed upon by the court below, and as there is presented herein no substantial federal or constitutional question, respondents respectfully submit that there is no proper basis for the issuance of a writ of certiorari or review of the decision of the Court of Appeals of Maryland.

Respectfully submitted,

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